No. 275.

Reply Brief of Plaintiff in Error.

Filed April 23, 1901.

In the Supreme Court

OF THE

UNITED STATES.

October Term, 1900.

A. J. Tullock,	Plaintiff in Error,	No. 275.
vs.		
Joab Mulvane,	Defendant in Error.	

REPLY BRIEF OF PLAINTIFF IN ERROR.

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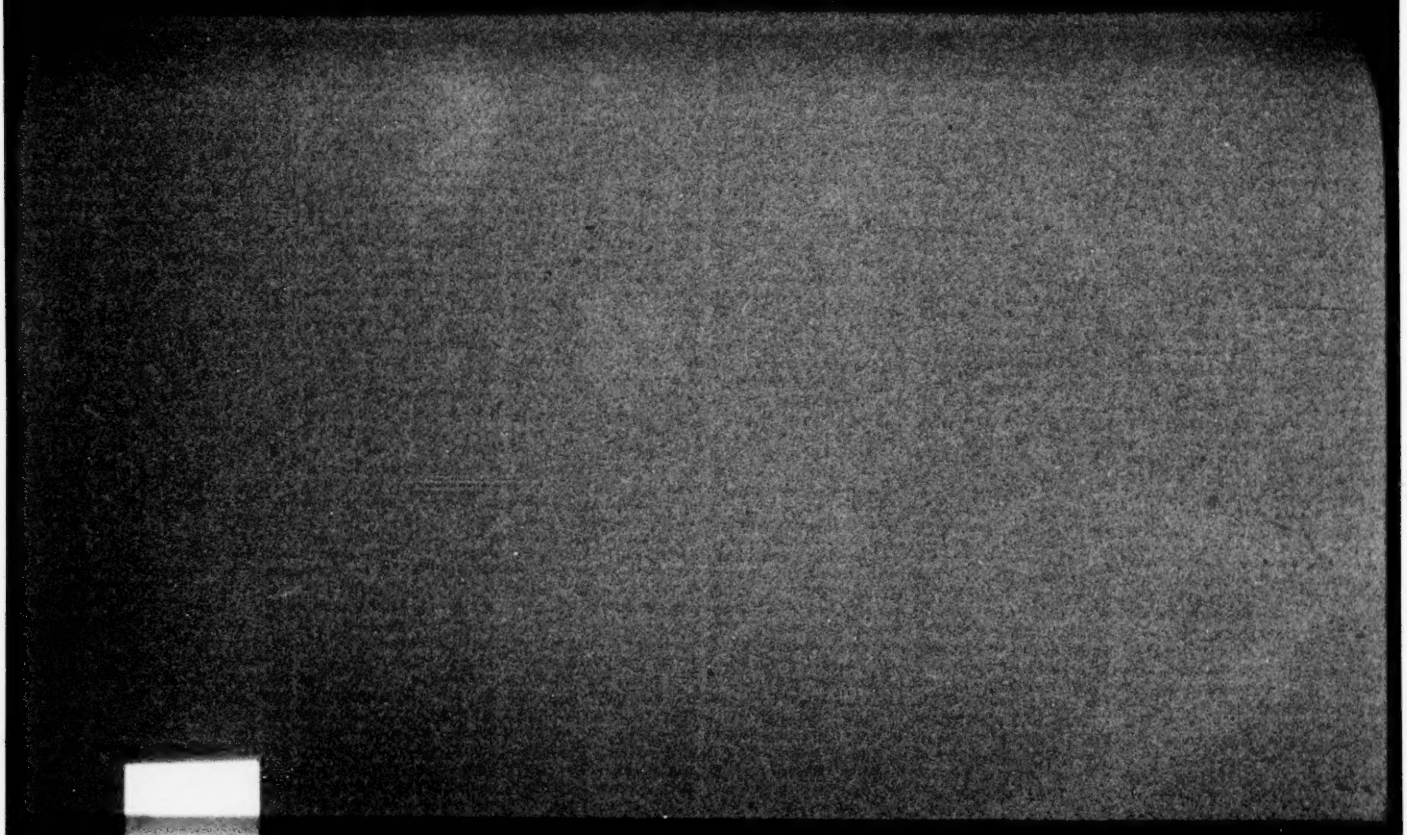

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An examination of the brief and argument filed on behalf of the defendant in error shows that it is confined to an attempt to avoid a determination of the merits of this controversy. Substantially no effort in the way of argument is put forth to sustain the rightfulness of the judgment complained of.

It seems to us that the learned counsel entirely misconceive the essential nature of this case and

their objection to a consideration of this writ of error proceeds from a fundamentally erroneous theory. We perhaps have already sufficiently covered the points in our brief, but we desire to briefly state certain propositions which we believe are controlling and which entitle us to a review of the merits, with a citation of the authorities in their support:

The suit being founded upon a bond exacted by the Federal court, necessarily involves a Federal question.

This proposition finds its practical and conclusive support from the fact that this court in at least two cases has entertained and decided on their merits writs of error to the State courts in suits upon Federal injunction bonds: *Bein vs. Heath*, 12 How. 168, and *Meyers vs. Block*, 120 U. S. 206.

The jurisdiction of the United States Circuit Courts to entertain original suits upon such obligations irrespective of the citizenship of the parties has been recognized in a large number of cases and has never been questioned.

Leslie vs. Brown, 32 C. C. A. 556, 90 Fed. 171.

See, also, pp. 37, 38, 39 and 40 of our original brief, wherein the authorities are collated.

In *Nashville C. & St. L. Rwy. Co. vs. Taylor*, 86 Fed. 168, the court, after a thorough examination of the authorities, digests this proposition in one of the paragraphs of the syllabus as follows:

"In that class of cases in which a federal question is involved and on which jurisdiction of the courts of the United States depends, the character of the question is the same whether the jurisdiction exercised is appellate, original, or by removal; the jurisdiction in either form depending upon the constitutional grant of power."

As throwing more or less light upon this question, reference may also be made to the following additional cases to those contained in our brief:

Clements vs. Berry, 11 How. 398.

Buck vs. Colbath, 3 Wall. 334.

Factors' & Traders' Ins. Co. vs. Murphy, 111 U. S. 738.

New Orleans, etc., R. R. Co. vs. Delamore, 114 U. S. 501.

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S. 141.

Etheridge vs. Sperry, 139 U. S. 266.

Texas & P. R. Co. vs. Cox, 145 U. S. 593.

Sonnentheil vs. Christian, etc., Brewing Co., 172 U. S. 401.

Pittsburg, etc., Rwy. Co. vs. Long Island Loan & Trust Co., Id. 493.

The test of a Federal question is not the ruling of the court. The significance of an adverse ruling lies solely in the fact that thereby the aggrieved party is entitled to present the Federal question for review by this court.

Furman vs. Nichol, 8 Wall. 44.

The jurisdiction of this court to review on writ of error the judgments of the State courts in this class of cases is broader than the original jurisdiction of the Circuit Courts of the United States.

See, *Nashville, etc., Ryy. Co. vs. Taylor*, 86 Fed. 175, which fully discusses this proposition.

The rights of the parties in this case are not to be determined by principles of general law, but are governed and controlled by the decisions of this court.

This is a question which we have fully and carefully elaborated in our principal brief. It seems to us that the brief for defendant in error begs the whole question by assuming, without argument or citation of authorities for its support, that the bond sued upon is to be treated entirely as an independent contract. This we have shown

from prior decisions of this court to be untenable.

See, particularly, *Russell vs. Farley*, 105 U. S. 433.

It cannot be successfully denied that Tullock had a right to make this bond and that he did so in view of the law as declared by this court governing such bonds and the liabilities which sureties thereby assume.

Olcott vs. Supervisors, 16 Wall. 690.

Burgess vs. Seligman, 107 U. S. 20.

The implication of law is that in executing the bond the surety did it in the view which the established practice in courts of equity attach to such proceedings. Inasmuch as a writ of error will issue from this court to review the judgment of the State court in cases of this character, the decisions of this court are paramount authority and binding upon the State tribunal.

Counsel curiously misconceive the purpose of our argument wherein, on page 27 of their brief, they concede the power of the Circuit Court of the United States to modify or entirely remit liability upon the undertaking, but urge that nothing of that kind was done in the case at bar. If it be granted that such power exists, then it inevitably follows that the undertaking cannot be

treated as an absolute and independent contract, but must be regarded as auxiliary and incidental to the main cause; and this was the entire purpose of the suggestion of such power which we made in our brief.

The record herein shows by clear and necessary intendment that a Federal question was directly involved and that the State court could not have rendered the judgment which it did without deciding it; that its decision was opposed to the decisions of this court upon the same question and denied to the plaintiff in error an immunity and protection which he claimed in a timely and proper way under the laws of the United States.

Under the record produced here there can be no serious claim that the questions which we seek to review in this court were not fully and fairly presented to both the trial and Supreme Courts of Kansas and were there decided adversely to the contentions of the plaintiff in error; that he claimed in the court below immunity from the measure of damages enforced upon this undertaking by the State court; and demanded that the Federal law be applied to the questions involved in the case; and that his claim was denied. This was

not only interposed by the objections to testimony and the amendment to the answer which are referred to in the brief for defendant in error, but in addition, was directly presented by the requests for instructions duly prayed by the defendant upon the trial of the action.

See, pp. 269 *et seq.* of the record.

The opinion itself is to be treated as a part of the record in this case and it may be examined in order to ascertain the fact whether these questions were so presented.

Egan vs. Hart, 165 U. S. 188.

This opinion shows clearly that the concrete questions which are urged here were presented and considered and decided adversely to the contention of the plaintiff in error. It is difficult to conceive what more could be required from the plaintiff in error in a fair effort to invoke the protection and immunity against both the measure of damages and the claim of liability on the bond which were enforced against him by the court below.

The State court did not give due effect to the order of the United States Court in requiring and approving the injunction bond, and denied to the

defendant a protection and immunity thereunder which he invoked.

This case comes clearly within the rule of *Green Bay, etc., Co. vs. Patten Paper Co.*, 172 U. S. 58, and which is referred to in *Dewey vs. Des Moines*, 173 Id. 199.

See, also, *Kaukauna Water, etc., Co. vs. Green Bay, etc., Co.*, 142 U. S. 254.

Hagar vs. California, 154 U. S. 639.

Sayward vs. Denny, 158 U. S. 180.

M. K. & T. Ry. Co. vs. Haber, 169 U. S. 613.

Railroad Co. vs. Iowa Homestead Co., 123 U. S. 552.

The Bridge Co. vs. The Hoboken Co., 1 Wall. 116.

C. B. & Q. Rld. Co. vs. Chicago, 166 U. S. 226.

The whole point is stated by this court in its syllabus in *Furman vs. Nichol*, 8 Wall. 44, as follows:

"It need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did."

Also, following this decision the Federal court in the case of *Nashville C. & St. L. Rwy. Co. vs. Taylor*, 86 Fed. 168, held:

"There is a clear distinction between the existence of a Federal question, for the purpose of jurisdiction, and the actual decision of that question on its merits. The jurisdiction of the Federal courts does not depend upon the validity of the claim set up under the Constitution or laws of the United States, but upon the fact that the claim involves a real and substantial dispute or controversy in the suit."

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